Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THE HONORABLE JOHN MCBRYDE,

Petitioner,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the finality clause of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c)(10) ("the Act"), bars a court from hearing as-applied constitutional challenges to the discipline of an Article III judge—including claims that the discipline imposed violates the judicial independence guaranteed by Article III and that the disciplinary proceedings denied the judge due process.

2. Whether punishing an Article III judge (including suspending him from hearing cases) based upon the merits of his substantive and procedural rulings and actions in cases properly before him violates the judicial independence guaranteed by Article III.

3. Whether the Act violates separation of powers and Article III judicial independence by empowering judicial administrative agencies to punish Article III judges for non-criminal "conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 372(c)(1).

4. Whether a federal judge sanctioned under the Act is entitled to judicial relief because the Judicial Council and Judicial Conference exceeded their authority under the Act by (i) investigating and punishing the judge for the merits of his judicial findings, rulings, orders, and procedural rules, and (ii) conducting an investigation into, and punishing him for, conduct not the subject of a complaint made against him under the Act.

RULE 14.1(b) STATEMENT

Pursuant to this Court's Rule 14.1(b), petitioner states that the parties in the court of appeals, who are respondents here, included: the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States (defendant-appellee below); the Review Committee's Chairman, Judge William J. Bauer (defendant-appellee below); the Judicial Council of the Fifth Judicial Circuit (defendant-appellee below); and the United States of America (intervenor/defendant-appellee below). Also a party below was the late Judge Henry A. Politz, who, at the relevant time, was Chief Judge of the United States Court of Appeals for the Fifth Circuit and presiding member of the Judicial Council of the Fifth Judicial Circuit.

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John McBryde, United States District Judge for the Northern District of Texas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App. 1a-51a) are reported at 264 F.3d 52. The order denying rehearing en banc and the dissent thereto (App. 302a-04a) are reported at 278 F.3d 29. The district court's opinion (App. 52a-124a) is reported at 83 F. Supp. 2d 135.

JURISDICTION

The court of appeals entered judgment on September 21, 2001, and denied a timely petition for rehearing en banc on February 1, 2002. On April 16, 2002, the time for filing this petition was extended to and including June 1, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), and pertinent constitutional provisions are set forth at App. 305a-07a.

STATEMENT OF THE CASE

In this case, for the first time in the history of the federal judiciary, a judicial administrative body has deprived an Article III judge of a part of his judicial function of hearing and deciding cases as a sanction for rulings and judicial actions with which it disagrees. That sanction, together with a harsh and unprecedented public reprimand, was issued under the Judicial Conduct and Disability Act of 1980 ("the Act"). The sanctions were based almost entirely on disapproval of the judge's judicial philosophy embodied in his decisions and rulings, including his control of the conduct of proceedings in his courtroom.

The discipline imposed on Judge McBryde has received only truncated judicial consideration. In a marked departure

from precedents of this Court, other circuits, and its own prior decisions concerning statutory limits on judicial review, the D.C. Circuit majority held that it was precluded by statute from hearing Judge McBryde's as-applied constitutional challenges to the discipline imposed upon him, including his claim that the imposition of discipline based upon disagreement with his judicial actions violated constitutional guarantees of judicial independence—a claim the dissenting judge found convincing. The majority also refused to entertain Judge McBryde's facial separation-of-powers challenge to the statutory provision allowing suspension of case assignments, on the ground that the expiration of Judge McBryde's suspension while this case was pending mooted the issue.

Both the procedural rulings through which the D.C. Circuit majority avoided the difficult constitutional issues at the heart of this case and the merits of those constitutional issues themselves deserve review by this Court—the former because they represent distortions of the law of review preclusion and mootness and conflict in principle with the decisions of this and other courts, and the latter because they are unresolved issues of fundamental importance to the administration of justice in the federal courts.

A. ***The Administrative Proceedings.*** Proceedings against Judge McBryde began in 1995, after his rulings in two cases ("*Satz*" and "*Torres*") questioned the credibility of an Assistant U.S. Attorney and criticized the Clerk of the Northern District of Texas. The Chief Judge of the Northern District transferred the cases to his own docket and reversed Judge McBryde's rulings. Believing the transfers improper, Judge McBryde requested assistance from the Fifth Circuit Judicial Council—despite a threat that, if he did so, his entire judicial career would be explored.

On September 13, 1995, the chief circuit judge commenced the proceedings that led to this case by appointing a five-member committee of judges (including himself) to investigate not only Judge McBryde's request for assistance,

but also two "complaints" against Judge McBryde under 28 U.S.C. § 372(c). The first had been filed two months earlier by a disgruntled lawyer upset by Judge McBryde's procedural rulings in a civil case. The Clerk of the Fifth Circuit had advised the chief circuit judge that the complaint was subject to dismissal "as directly related to the merits of a decision or procedural ruling." J.A. 309. The second "complaint" was not a complaint at all, but a letter from then-Assistant Attorney General Frank Hunger expressing the Justice Department's support for the transfer of the *Satz* case.

On October 19, 1995, the committee held a hearing, telling Judge McBryde it was solely on his request for assistance. After Judge McBryde testified, the committee excluded him and heard a number of witnesses whose testimony concerned many other aspects of his performance as a judge. The next day, the Judicial Council issued an order rebuking Judge McBryde for his handling of the *Satz* and *Torres* cases and ratifying their transfer from his docket.

Judge McBryde promptly filed a mandamus petition in the Fifth Circuit challenging the transfers. The court eventually decided that Judge McBryde's actions in *Satz* and *Torres* were reasonable and the transfers were unlawful. *In re McBryde*, 117 F.3d 208 (5th Cir. 1997), *cert. denied*, 524 U.S. 937 (1988) (App. 315a-58a). The Judicial Council, however, accelerated its proceedings against Judge McBryde once he turned to the courts for relief.

In November 1995, the investigating committee retained private counsel, who sought opinions from two psychiatrists about Judge McBryde's mental stability—opinions solicited without notice to Judge McBryde and on the basis of inaccurate descriptions of his conduct in *Satz*, *Torres*, and other matters. The psychiatric opinions were used to support a July 1996 Judicial Council order requiring Judge McBryde to undergo a psychiatric examination, on pain of suspension of all case assignments if he refused. The Council dropped the suspension sanction when Judge McBryde filed a lawsuit, but it

persisted in seeking to compel him to undergo a mental examination by filing contempt proceedings.

Meanwhile, the chief circuit judge "identified" three more "complaints" against Judge McBryde. One was filed by a prisoner who said the judge was mentally unfit based on the "twisted reasoning" of his opinions. J.A. 486. The chief circuit judge rejected the court clerk's recommendation that it could be dismissed as frivolous. Another, from a friend of a convicted defendant, said Judge McBryde should be impeached for "collusion" with the prosecution. J.A. 511. The last was an unsworn complaint from a witness in *Satz*, who was upset that Judge McBryde had not believed his testimony. Despite the facial defects in these "complaints," the chief circuit judge "identified" their allegations as complaints under 28 U.S.C. § 372(c)(1), without stating reasons for his actions as that provision requires.

In the spring of 1997, the Council abruptly dropped its attempt to use contempt proceedings to force a mental examination on Judge McBryde, and announced that the five-judge committee would hold an evidentiary hearing on the complaints. The hearing was eventually set for August 1997. In May and June, counsel for the committee advised Judge McBryde's attorneys that the committee was expanding its investigation beyond the complaints. On July 2, 1997, the Fifth Circuit issued its opinion in *In re McBryde*, endorsing the reasonableness of Judge McBryde's conduct in *Satz* and *Torres*. Far from dissuading the committee from proceeding against Judge McBryde, the decision had the opposite effect: On July 25, 1997, with the hearing a month away, the committee's counsel provided Judge McBryde with a list of dozens of new subjects to be addressed at the hearing—most involving his rulings and conduct of proceedings in cases. None was the subject of a § 372(c) complaint. As the hearing approached, even more new subjects were added to the list.

The committee received testimony and evidence in two closed sessions from August 25-29 and September 29-

October 2, 1997. The wide-ranging testimony was not confined to subjects of which Judge McBryde had notice. The committee's witnesses critiqued rulings Judge McBryde had made throughout his judicial career and told of the reactions of lawyers to his decisions and procedural rules. Judge McBryde was examined about why he made particular rulings, what consideration he gave to their impact on lawyers and litigants, his motives and justifications for deciding as he did, and his reasons for not making alternative rulings. A psychiatrist retained by the committee attended all the proceedings, which were otherwise closed to all but the committee, witnesses, counsel and Judge McBryde.

On December 4, 1997, the committee issued a 159-page report recommending sanctions against Judge McBryde. App. 163a-301a. After giving Judge McBryde only 11 days to respond, the Council met to consider the report on December 17, 1997, and 14 days later issued an order finding Judge McBryde's conduct "prejudicial to the effective and expeditious administration of the business of the courts." App. 160a. It imposed three sanctions: a one-year suspension of new case assignments; a three-year suspension from cases involving particular attorneys; and a damning public reprimand. Without ruling on any complaint or specifying exactly what conduct it was punishing, the order labeled Judge McBryde "arbitrary," "abusive," and "intimidating" and stated that he had "imposed unwarranted sanctions on lawyers" and "repeatedly and unjustifiably attacked individual lawyers, groups of lawyers, and court personnel." *Id.* The order adopted the committee report "[t]o the extent relevant to the action taken." App. 159a.

The report, in turn, made clear that Judge McBryde was punished in large measure based on disagreement with his exercise of the judicial functions of deciding issues properly before him, making findings relevant to those issues, and implementing rules and procedures for the control of participants in proceedings before him. For example:

(a) The "unwarranted sanctions" included: (i) sanctions against two Assistant U.S. Attorneys based on Judge McBryde's finding that they had failed to engage in good-faith settlement discussions (sanctions that the government successfully appealed) (App. 194a-99a); (ii) a coercive civil contempt sanction against an attorney who had refused to disclose nonprivileged information in response to Judge McBryde's order that he do so (an order the Fifth Circuit sustained) (App. 210a-13a); (iii) a sanction imposed on an attorney who violated orders governing settlement conferences (a sanction from which no appeal was ever taken) (App. 179a-83a); and (iv) a matter in which Judge McBryde was still considering at the time of the committee report whether to sanction a lawyer for violating an order (and in which he ultimately decided that sanctions were *not* warranted) (App. 239a-46a).

(b) The "attack" on "court personnel" referred to Judge McBryde's orders addressing the conduct of the Clerk of the Northern District in the *Torres* case, orders that the Fifth Circuit had found to be reasonable in *In re McBryde*. App. 223a-28a; App. 334a.

(c) The "attacks" on individual lawyers included: (i) Judge McBryde's statement in a settlement conference that "I think the SEC is negotiating in bad faith. I think the SEC is in violation of the local rule that requires good-faith settlement negotiations" (App. 176a); (ii) Judge McBryde's statement to an Assistant U.S. Attorney that he disapproved of "a cat and mouse approach to discovery" and that "I am a little bit disappointed in the way it was handled" (App. 206a, J.A. 907); (iii) Judge McBryde's finding (conceded to be correct by one of the AUSAs involved) that statements made on behalf of the government in a sentencing reduction matter were false (App. 228a-32a); and (iv) findings and rulings made by Judge McBryde in *Satz*, which the Fifth Circuit found "cogent" and "legitimate" in *In re McBryde* (App. 218a-23a; App. 333a-34a).

(d) The "attacks" on "groups of lawyers" included comments made by Judge McBryde in two separate hearings that he was disappointed in the conduct of attorneys in the civil section of the U.S. Attorney's Office and in the Federal Public Defender's Ofice, respectively. App. 196a, 179a.

(e) The "arbitrary," "abusive," and "intimidating" labels were based on rulings such as those just described as well as Judge McBryde's conduct of trials and other courtroom proceedings—*e.g.*: (i) his requirement that parties and witnesses wear jackets and ties in jury trials; (ii) his prohibition on newspapers in the courtroom; (iii) an occasion when he had an attorney escorted from the courtroom after the attorney repeatedly interrupted proceedings in an effort to have his case called out of turn (App. 235a-39a); (iv) an incident when Judge McBryde had a staff member tell a state court judge and his court reporter they were not welcome at an in-chambers pretrial conference that did not involve them (App. 213a-18a); and (v) trial procedural rulings such as time limits on opening and closing statements and voir dire, requirements that agreed facts be stipulated and not be the subject of testimony, and enforcement of rules against argumentative openings, repetitive questioning and cross-examination beyond the scope of direct (App. 251a-63a).

Judge McBryde sought review by the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders. In September 1998, the Review Committee upheld the sanctions. The Review Committee rejected the judge's contention that the Council had exceeded its authority by sanctioning him for matters that were not subjects of complaints under 28 U.S.C. § 372(c)(1), but it acknowledged that "the lion's share" of the findings "concerned matters not raised in those complaints." App. 132a. The Review Committee also rejected Judge McBryde's argument that the Council had improperly sanctioned him based on its disagreement with his procedural and substantive judicial rulings. Entering the realm of metaphysics, the Review Com-

mittee held that "[t]he sanctions are not based upon the legal merit of the judge's orders and rulings on the bench, but on the pattern of conduct that is evidenced by those orders and rulings." App. 143a.

Although Judge McBryde also raised constitutional claims that the proceedings against him violated separation of powers, infringed judicial independence, and denied him due process, the Review Committee said it could not address them because constitutional issues were beyond its competence and such matters were for a court. App. 150a-51a. The Review Committee acknowledged, however, that no court had ever adjudicated the constitutionality of a suspension order under § 372(c) and that "the instant matter is the first time this suspension sanction ... has ever been invoked." *Id.*

By the time the Review Committee ruled, the proceedings against Judge McBryde had consumed over three years. He had spent thousands of hours he otherwise would have devoted to judicial business on his defense and incurred personal legal expenses of over $1 million. When the suspensions went into effect, his judicial business dwindled to only 32 civil cases and three criminal ones by June 1999. Hundreds of cases he would have handled went to other judges.

B. ***The Judicial Proceedings.*** Judge McBryde filed this action against the Review Committee and Council in the U.S. District Court for the District of Columbia, invoking jurisdiction under 28 U.S.C. § 1331 and challenging the sanctions on constitutional and statutory grounds. Judge McBryde alleged: that the Council and Review Committee acted outside their authority under 28 U.S.C. § 372(c) by sanctioning him for conduct that was not the subject of any complaint and by punishing him based on the substance of his judicial rulings; and that § 372(c) is unconstitutional on its face (as a violation of separation of powers and judicial independence) and as applied to him (insofar as its application infringed his judicial independence and denied him due process). The United States intervened to defend the statute. The district court de-

nied a temporary restraining order in November 1998. On December 30, 1999, the court granted summary judgment to the respondents, holding the statute constitutional on its face and as applied. Although the court held that the finality provision in § 372(c)(10) allowed it to address the constitutional claims, it ruled that that provision prevented consideration of Judge McBryde's statutory arguments. App. 87a.

Judge McBryde appealed, and a divided D.C. Circuit panel affirmed in part and vacated in part. Because the case suspensions had expired by the time the court ruled, the panel majority first considered whether the case was moot. The majority held that the challenge to the "stigmatizing" reprimand remained alive because it inflicted continuing, serious harm on Judge McBryde. App. 6a. But the majority found Judge McBryde's challenges to the suspensions moot because their persisting stigmatizing effects were only "collateral" and were "vague and unsubstantiated." App. 7a. And although the majority recognized that temporary suspensions would tend to "evade review," it held they were not "capable of repetition" because the likelihood Judge McBryde would again be sanctioned was "fairly slight." App. 4a-5a.

The majority then considered whether consideration of Judge McBryde's claims was barred by the finality clause in 28 U.S.C. § 372(c)(10). The court recognized that "a serious constitutional question" would arise if a statute "were construed to deny any judicial forum for a colorable constitutional claim." App. 8a. Thus, "[w]hen the Constitution is invoked, a claim of preclusion faces an especially high hurdle," requiring clear and convincing evidence that Congress intended to preclude review. App. 9a (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988)). The majority acknowledged that the finality clause "closely parallels" (App. 8a) the language of the preclusion clause at issue in *Johnson v. Robison*, 415 U.S. 361 (1974), where this Court held that a provision making agency decisions "final and conclusive" and denying courts power to "review any such decision" did not divest the

courts of power to hear constitutional claims. Similarly, the court recognized the similarity between § 372(c)(10) and the preclusion provision of the Federal Employees Compensation Act, 5 U.S.C. § 8128(b), which several circuits, including the D.C. Circuit, have held permits consideration of constitutional claims. App. 10a.

Nonetheless, drawing a distinction not found in any of the precedents cited, the majority held that the finality clause precluded all of Judge McBryde's as-applied constitutional claims, and permitted consideration only of facial challenges. App. 15a. Recognizing that its ruling denied any forum for Judge McBryde's as-applied claims in light of the Review Committee's holding that it could not consider them, the court confined itself to suggesting that perhaps the Review Committee might rethink the issue. App. 24a. Further, rejecting Judge McBryde's contention that the clause did not preclude review of claims that the administrative bodies had acted in clear excess of their statutory authority, the court held that it could not consider any of Judge McBryde's statutory claims. App. 17a.

The majority then turned to Judge McBryde's facial constitutional challenges to the statute's authorization of judicial reprimands—the only issues its mootness and preclusion rulings permitted it to address. Rejecting the view that Article III guarantees judges a measure of independence from other judges, the majority held that Article III insulates the judiciary only from interference by the executive and legislative branches. App. 18a. The majority also rejected Judge McBryde's separation of powers argument that the Constitution reserves to Congress authority to discipline federal judges. Although the majority acknowledged that the argument that the statute contravenes Congress' exclusive impeachment power "works well for removal and disqualification" sanctions, it held that granting bodies of judges the power to censure other judges did not threaten the constitutional allocation of powers. App. 22a.

Judge Tatel dissented in part. He concurred that the statutory authorization for judicial reprimands was not facially unconstitutional and that the statute precluded review of statutory claims, but his agreement ended there. Regarding mootness, Judge Tatel found that the continuing stigmatizing effects of the suspensions were "at least as serious" as those of the reprimand. App. 51a. Judge Tatel also would have held the suspensions "capable of repetition." He observed that while Judge McBryde was now "on notice" that his judicial actions could lead to suspension, it was "unclear precisely what kind of conduct would trigger sanctions." *Id.* "Given this uncertainty," there is "ample reason to suspect" a repetition of sanctions. *Id.* Thus, Judge Tatel concluded, the challenges to the suspensions should have been addressed.

The dissenter also rejected the majority's holding that § 372(c)(10) precluded as-applied constitutional challenges. There was, he said—and the majority had not disagreed—no language in the statute barring consideration of constitutional claims. This contrasted with other statutes that expressly bar consideration of "interpretation and application of constitutional and statutory provisions." App. 32a. The legislative history, he noted, was equally barren, and the majority's reliance on the history of prior unenacted versions of the statute was improper. App. 33a. Under such circumstances, Judge Tatel concluded, precluding as-applied constitutional challenges was contrary to Supreme Court and circuit precedent.

Judge Tatel then considered Judge McBryde's as-applied constitutional claim that the sanctions infringed judicial independence. Looking to cases such as *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871), and *Pierson v. Ray*, 386 U.S. 547 (1967), Judge Tatel argued that Article III guarantees judges "a degree of protection against interference with their exercise of judicial power"—including "interference by fellow judges." App. 38a. "A judge's authority to control the courtroom," he emphasized, "is essen-

tial to the exercise of judicial power." App. 40a. Accordingly, the Constitution permits a judge to be sanctioned "only for conduct that is *clearly* abusive or *clearly* prejudicial to the adversarial process." App. 42a. Although Judge Tatel thought some of the conduct underlying the sanctions met this standard, many of the incidents were "trivial" and the basis for the sanctions unexplained. App. 46a. Thus, Judge McBryde may have been sanctioned for "legitimate judicial behavior," and upholding "sanctions based on this record risks chilling legitimate conduct by other judges." *Id.*

Judge McBryde sought rehearing en banc. Three of the eight active judges recused. Of the remaining five, three voted for rehearing, but because a majority of active judges was required, the petition was denied. Judges Tatel and Sentelle dissented on the ground that the panel's review preclusion holding "conflicts with well-established precedent of both the Supreme Court and this circuit." App. 303a.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Holding that the Statute Precludes As-Applied Constitutional Claims Conflicts with Precedents of this and Other Courts.

The relevant part of 28 U.S.C. § 372(c)(10) reads: "Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." In holding that this statute bars as-applied constitutional claims, the panel majority paid only lip-service to binding precedents of this Court, and its holding conflicts in principle with those precedents as well as decisions of other circuits and the D.C. Circuit itself.

The panel opinion does what this Court has so far steadfastly refused to countenance: It interprets a statute to deny any judicial forum for substantial constitutional claims. This Court has consistently applied a strong presumption against review preclusion. *See, e.g., INS v. St. Cyr*, 533 U.S. 289 (2001). The presumption is heaviest when constitutional

claims are at issue because of the "serious constitutional question"—which this Court has not resolved—that would arise "if a federal statute were construed to deny any forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. at 603. Thus, this Court has held preclusion clauses at least as broad as § 372(c)(10) to allow review of constitutional and even nonconstitutional claims. *Webster*, 486 U.S. at 603; *Johnson v. Robison*, 415 U.S. 361 (1974); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Lindahl v. OPM*, 470 U.S. 768 (1985).

The panel majority's restriction of this principle to facial constitutional challenges finds nc support in this Court's precedents. *Webster* itself permitted review of an as-applied claim in the face of a sweeping preclusion provision. Moreover, the panel majority mustered no support in the language or history of the statute to support the notion that Congress clearly intended to preclude as-applied challenges while *permitting* facial ones. Indeed, if the avoiding-constitutional-doubt rationale supports permitting judicial review of the constitutionality of acts of Congress, it follows even more strongly that the acts of administrative bodies can fare no better. Congress could hardly have intended to allow judicial review of its own actions but leave subordinate bodies free to trample constitutional rights without judicial oversight.

The panel majority's review preclusion decision conflicts not only with this Court's precedents, but also with a host of court of appeals decisions permitting review of as-applied constitutional challenges in the face of review preclusion statutes. For example, the panel majority recognized that the finality language in § 372(c)(10) was "quite similar" (App. 10a) to that of 5 U.S.C. § 8128(b).[1] Strikingly, the courts of

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[1] Section 8128(b) provides that agency actions under the Federal Employees Compensation Act are "final and conclusive for all purposes

(footnote continued)

appeals have recognized that, under the reasoning of *Webster* and its predecessors, § 8128(b) *cannot* be read to preclude review of as-applied constitutional claims. *Czerkies v. Dept. of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996) ("If Czerkies cannot maintain this suit, he has no administrative or judicial forum in which to litigate his claim that he was denied his constitutional right to due process of law."); *Brumley v. Dept. of Labor*, 28 F.3d 746, 747 (8th Cir. 1994); *Woodruff v. Dept. of Labor*, 954 F.2d 634 (11th Cir. 1992); *Owens v. Brock*, 860 F.2d 1363, 1367 (6th Cir. 1988); *Paluca v. Secretary of Labor*, 813 F.2d 524, 525 (1st Cir. 1987); *Rodrigues v. Secretary of Labor*, 769 F.2d 1344, 1347-49 (9th Cir. 1985).

While the rehearing petition was pending in this case, the D.C. Circuit itself held in *Lepre v. Dept. of Labor*, 275 F.3d 59 (D.C. Cir. 2001), that § 8128(b) does not bar as-applied constitutional claims. *Lepre* is only the latest D.C. Circuit opinion at odds with the preclusion holding in this case. *See, e.g., Griffith v. FLRA*, 842 F.2d 487, 494 (D.C. Cir. 1988); *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981); *Ralpho v. Bell*, 569 F.2d 607, 620 (D.C. Cir. 1977) ("[It] beggars the imagination to suggest that judicial review might be less crucial to assuring the integrity of administrative action than it is to make certain that Congress will operate within its proper sphere," and "[i]f the courts are disabled from requiring administrative officials to act constitutionally, it is difficult to see who would perform that function."). Indeed, the D.C. Circuit's own previous decisions concerning the Judicial Conduct and Disability Act had recognized that "sensitive and unsettled questions of constitutional law would arise if the challenged actions are covered by the prohibition on judicial review." *Hastings v. Judicial Conference*, 829 F.2d 91, 108 n.69 (D.C. Cir. 1987); *see also Hastings v. Judicial Conference*, 770 F.2d 1093, 1109-10 (D.C. Cir. 1985) (Edwards,

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and with respect to all questions of law and fact" and are "not subject to review ... by a court by mandamus or otherwise."

J., concurring) ("If, however, section 372(c)(10) is interpreted to bar all judicial review of claims of illegality in the decisionmaking process, ... the constitutionality of the Act's combination of investigative and adjudicative powers in the same bodies would be called into serious question.").

The panel majority, however, cut off judicial consideration of constitutional claims without resolving the "serious constitutional questions" its action posed. This Court should review the preclusion ruling because it is contrary to this Court's precedents; because its incompatibility in principle with decisions of other circuits and the D.C. Circuit itself reveals a need for further guidance from this Court on the important and recurring issue of the circumstances in which constitutional claims may be statutorily precluded; because it effectively denies *any* forum for weighty constitutional issues of judicial independence and due process posed by the extraordinary sanctions imposed on Judge McBryde; and because it places before the Court the fundamental, unresolved question whether judicial consideration of substantial constitutional claims may constitutionally be foreclosed.

II. This Court Should Determine Whether the Constitutional Principle of Judicial Independence Permits Sanctioning a Judge Based on Disagreement with His or Her Judicial Acts.

The panel majority's preclusion analysis enabled it to sidestep one of the most disturbing and important constitutional issues presented by this case: Whether it is consistent with the constitutional principle of judicial independence to allow the Judicial Conduct and Disability Act to be applied to permit groups of judges acting as administrators to punish an Article III judge based on his philosophy and methods of judging and the merits of his decisions in particular matters. As Judge Tatel recognized, rejection of the panel majority's flawed preclusion analysis brings this issue squarely to the forefront, because there is no room for doubt that the punishment of Judge McBryde rested largely on disapproval of

particular rulings on procedural and substantive matters as well as his practices in regulating proceedings in his courtroom. Because of its fundamental importance to the administration of justice in the federal courts, this Court should consider Judge McBryde's as-applied constitutional claim that the sanctions violate the principle of judicial independence.[2]

Article III "unambiguously enunciates a fundamental principle – that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 60. *See also Chandler v. Judicial Council*, 398 U.S. 74, 84 (1970) ("There can, of course, be no disagreement . . . as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function."). As Alexander Hamilton wrote:

> [The] independence of the judges is . . . requisite to guard the Constitution and the rights of individuals [against legislative encroachments and] from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among people. . . .

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[2] Unless this case were completely resolved in Judge McBryde's favor on the merits of the judicial independence, separation of powers, or statutory arguments presented herein, rejection of the majority's preclusion analysis would also require remand for consideration of Judge McBryde's evidence-intensive due process claim. The record establishes his entitlement to summary judgment on that ground, which involves bias on the part of the adjudicators and the inappropriate combination of the roles of complainant, investigator, prosecutor, grand jury, and adjudicator in those who sanctioned him, as well as inadequate notice of the charges against him and other pervasive irregularities. *See In re Murchison*, 349 U.S. 133, 136 (1955); *Wildberger v. AFGE*, 86 F.3d 1188, 1196 (D.C. Cir. 1996); *Tincher v. Piasecki*, 520 F.2d 851, 855 (7th Cir. 1975).

THE FEDERALIST NO. 78, at 469 (C. Rossiter ed. 1961). "The guarantee of life tenure insulates the individual judge from improper influences not only by other branches *but by colleagues as well*, and thus promotes judicial individualism." *Northern Pipeline*, 458 U.S. at 59 n.10 (emphasis added).

As the Fifth Circuit noted in *In re Clay*, when judges intrude into the judicial affairs of a fellow judge they chill the individualism essential to Article III judicial independence:

> [Article III's] guarantees insure independence from legislative and executive influence, promote public confidence in judicial integrity, attract well qualified jurists to the bench, and insulate judges from pressure by other judges. . . . Courts and commentators focus on the importance of insulating judges from Congress and the Executive Branch. But as Chief Judge Kaufman noted, "it is equally essential to protect the independence of the individual judge, even from incursions by other judges. The heart of judicial independence, it must be understood, is judicial individualism," and giving one judge power over another chills judicial individualism. Irving R. Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 713 (1979).

35 F.3d 190, 192 (5th Cir. 1994) (internal citations omitted).

Whether the principle of judicial independence can be squared with attempts to control a judge's decisionmaking through sanctions imposed by committees of federal judges rather than through the appellate process is a significant and unresolved issue. The previously decided case nearest in point is the Fifth Circuit's decision in *In re McBryde* (App. 315a-58a), which addressed the actions taken against Judge McBryde by the chief judge of his court and the Judicial Council based on his judicial actions in *Satz* and *Torres*. Fearing the chilling effects of such sanctions on judicial independence, the court in that case strongly affirmed that "[a] trial judge should not fear that because of comments he or she makes from the bench, which in good faith the judge

feels are related to the proceeding before the court, he or she ultimately may be subject to a disciplinary sanction by the Judicial Council." App. 356a (citation omitted). Holding the sanctions unlawful, the Fifth Circuit said that they "threatened the proper functioning of the judicial process" and "the very structure of the federal court system" (App. 342a), and that the taking of those actions due to a disagreement with Judge McBryde's rulings was "antithetical to and incompatible with the structure of the federal judicial system" (App. 346a). Those actions against Judge McBryde in 1995 pale in comparison to the investigation of his entire judicial career, the intimidating threats of psychiatric evaluation, and the punishment meted out because of disapproval of his philosophy and methods of judging and the merits of his decisions.

Moreover, to say, as the Review Committee did, that the punishments imposed on Judge McBryde were based on a "pattern" of his judicial actions only exacerbates the problem. That assertion pointedly emphasizes the danger of what happened to Judge McBryde. His judicial independence as an Article III judge was eroded both by the investigation into the judicial findings, rulings, and orders he made and procedural rules he applied throughout his career (an investigation that required him, years after the fact, to submit to questioning, under the watchful eye of a psychiatrist, about why he took each questioned action), and by the ensuing punishment, including temporary impeachment, *see United States v. Anderson*, 160 F.3d 231, 237 (5th Cir. 1998) (Jones, J., dissenting), he received based on disapproval of his judicial conduct. Permitting judicial administrative bodies to sift through the judicial actions of a judge throughout his or her career in search of a "pattern" they find unacceptable is even more destructive of the judge's independence than is an inquiry into the merits of individual rulings.[3]

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[3] Indeed, the severe financial burdens that the defense of such an investigation imposes on an Article III judge themselves severely under-

(footnote continued)

Judge McBryde was punished because judicial actions that accorded with his strict style of courtroom management offended or intimidated attorneys or crimped their courtroom styles. The next case could be one where the "pattern" found administratively unacceptable by the judicial hierarchy is a tendency to rule in favor of defendants or the government on Fourth Amendment issues; or a tendency to favor or disfavor civil rights plaintiffs or habeas petitioners; or a philosophy that tends to favor or disfavor a particular theory of recovery or type of legal action. The potential for mischief is infinite. That the judge in any of these illustrations was doing what he or she honestly thought the law and facts required would make no difference if the administrators to whom the judge were answerable happened to hold judicial views different from the judge's.

If the as-applied judicial independence challenge is not sustained, the concept of judicial independence of Article III judges as it has been known for two centuries will be irreparably damaged. Recently, the independence of the federal judiciary has faced serious challenges—including partisan political criticisms of nominees in the confirmation process, and outcries against rulings that do not conform to the desires or expectations of discrete groups or ideological movements. Such challenges are inherent in the constitutional provisions for advice and consent and freedom of speech. But the attack on Judge McBryde's judicial actions forms a new, and more dangerous, challenge to the independence of federal judges. Concerns that were expressed when judicial discipline legislation was under consideration will prove prescient if the holdings of the panel majority are allowed to stand:

> [N]o judge should be beholden to any other person, including other federal judges. A subservient judge is not

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mine judicial independence. *See Tashima v. Administrative Office of U.S. Courts*, 967 F.2d 1264, 1269-70 (9th Cir. 1992).

> his own man. He becomes fungible, intimidated, and dispossessed of that independent spirit which the Founders considered essential. Any such development cannot help but result in a lethal distortion of the delicate balance of power that has been largely responsible for the preservation of our essential liberties. . . . The circuit councils, like other authorities, are clearly capable of abusing their powers. And if their powers are so construed that they are able to judge their brethren on the district bench and render sanctions without meaningful restraints, the results can be disastrous to the very conception of our government.

Frank J. Battisti, *An Independent Judiciary or an Evanescent Dream?*, 25 Case W. Res. L. Rev. 711, 724, 738 (1975).

III. This Court Should Determine Whether The Judicial Conduct and Disability Act's Provisions for Disciplining Federal Judges Are Facially Constitutional.

The panel majority limited its review of the important and unresolved question of the facial constitutionality of granting disciplinary authority over federal judges to committees of their peers by holding that the issue of the constitutionality of the suspension sanction was moot. But the majority's mootness ruling was plainly erroneous under this Court's precedents and poses no obstacle to review by this Court of the issue of the constitutionality of the Act's disciplinary provisions, which this case starkly presents for the first time, and which this Court should resolve because of its great significance to the structure of our judicial system.[4]

A. *The Suspension Issue Is Not Moot.* Mootness was raised *sua sponte* by the panel without briefing. Judge McBryde filed the district court action less than a month after

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[4] For the same reasons, mootness concerns do not bar the Court from considering the impact of the suspension sanctions in connection with the as-applied judicial independence challenge discussed above.

the Review Committee rendered its decision (when the one-year suspension took effect) and almost two-and-a-half years before the three-year suspension expired. The district court denied interim relief on November 2, 1998, based in part on the view that lapse of time would not harm Judge McBryde because his docket could be restored by an order reassigning cases if he ultimately prevailed. By the time the district court ruled on December 30, 1999, on motions filed in mid-November 1998, the one-year suspension had expired. The three-year suspension expired in February 2001, three months after oral argument in the D.C. Circuit.

The majority's mootness holding rests on an incorrect premise—that the reputational injury Judge McBryde suffered from his temporary impeachment is not sufficiently greater or longer lasting than, or different from, the injury caused by the reprimand to constitute a continuing collateral consequence. App. 7a. Obviously, Judge McBryde would be better off if the temporary impeachment blot were removed from his record. And his docket still suffers from the loss of hundreds of cases that were diverted to other judges because of the case suspensions. Even the panel majority recognized that "docket limitations can be a very serious matter." App. 5a. Given these circumstances, the conclusion that the suspensions have no adverse collateral consequences conflicts in principle with the holding of this Court in *Sibron v. New York* that the mere possibility of adverse collateral consequences in a criminal case is enough to preserve a case "from ending 'ignominiously in the limbo of mootness.'" 392 U.S. 40, 55 (1968) (citation omitted).

The panel majority's decision also conflicts in principle with the "capable of repetition" concept formulated by this Court in *Honig v. Doe*, 484 U.S. 305, 323 (1988). Given the vague and overbroad disciplinary standards apparently applied by the Council, Judge McBryde could again find himself subject to similar proceedings based on his exercise of proper judicial functions in the manner in which he custom-

arily carries them out. The majority's application of this principle also failed to accord proper weight to the interests of Judge McBryde, the judiciary, and the public in obtaining answers to the issues raised by the agency-imposed, temporary impeachment of an Article III judge, *see Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 516 (1911), or to the resources that have been devoted to obtaining the answers, *see Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 191-92 (2000).

Most importantly, the majority's mootness analysis overlooks that in a structural separation of powers/judicial independence challenge such as this one, the principal relevant injury is not the immediate harm caused if a power denied by the Constitution is exercised, but the "here-and-now subservience" that the threat of exercise of that power creates in one subject to it. *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986). Just as in *Washington Metropolitan Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991), the threat of suspension "hangs over [Judge McBryde] like the sword over Damocles, creating a 'here-and-now subservience' ... sufficient to raise a constitutional question." Particularly in light of having been actually subjected to the suspension sanction, Judge McBryde has had his judicial independence chilled. Like a chilling effect on constitutionally protected speech, that injury does not dissipate simply because his suspension has expired.

B. ***The Facial Constitutional Challenge Is Substantial and Important.*** In the Act, Congress empowered judicial agencies it created under 28 U.S.C. §§ 331 and 332 to punish an Article III judge by public censure or reprimand and withdrawal of case assignments, § 372(c)(6)(B)(iv) and (vi), upon a finding of merit in a complaint that the judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts," § 372(c)(1). Congress thus purported to delegate to agencies within the Judicial Branch powers to sanction official misconduct that can

only be exercised by Congress through the constitutional impeachment process. *See Hastings v. Judicial Conference*, 770 F.2d at 1104, 1107 (Edwards, J., concurring). The question of the constitutionality of the punitive sections of the Act at issue here was reserved in *Hastings v. Judicial Conference*, 829 F.2d at 94, 99 n.36; *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1508-10 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986); and *Hastings v. Judicial Conference*, 770 F.2d at 1099-1100. This Court similarly reserved the question of the constitutionality of measures later incorporated in the Act in *Chandler v. Judicial Council*, 398 U.S. 74, and *Chandler v. Judicial Council*, 382 U.S. 1003 (1966) (per curiam).

While judicial precedent is lacking, commentary has been prolific. Senators Heflin, Mathias, and Laxalt thought the Act unconstitutional and dissented from the Judiciary Committee report. S. REP. NO. 96-362, at 21 (1979) ("Unlike the Legislative and Executive Branches of our government, the Judiciary was given no power [by the Constitution], either express or implied, to police its own members.") (Sen. Heflin); *id.* at 27 ("[The Act] would pose a direct and serious threat to the time-honored and constitutionally enshrined principle of judicial independence.") (Sen. Mathias); *id.* at 29 ("I believe [the Act] will chill the independence of the Federal Judiciary.") (Sen. Laxalt).

Chief Judge Irving Kaufman called a bill similar to the Act "unconstitutional, unnecessary, and, indeed, counterproductive." Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 683 (1979). Justices Black and Douglas thought the measures later incorporated into the Act clearly unconstitutional, *see Chandler*, 398 U.S. at 129-41, 141-43 (dissenting opinions); *Chandler*, 382 U.S. at 1004-06 (dissenting opinion). Chief Judge Edwards expressed serious doubts about the Act's constitutionality, *see Hastings*, 770 F.2d at 1104 (concurring opinion) ("What is even more curious to me is the apparently unquestioning acceptance by the

judiciary of an act that may, in part, be significantly at odds with our basic constitutional structure and previously inviolate principles of separation of powers."); Harry T. Edwards, *Regulating Judicial Misconduct and Divining Good Behavior for Federal Judges*, 87 MICH. L. REV. 765, 787-93 (1989).

Many academics, finally, have called the Act unconstitutional. *See, e.g.*, Letter from Prof. Gerald Gunther to Sen. Charles Mathias, *reprinted in Hearings before the H.R. Subcomm. on Courts of the Comm. on the Judiciary,* 96th Cong., 1st & 2d Sess. 218-19 (1980); L. Baker, *Unnecessary and Improper*, 94 YALE L.J. 1117, 1138-39 (1985); M. Freedman, *Removal and Discipline of Federal Judges*, 31 MERCER L. REV. 681 (1980); P. Abrams, *Spare the Rod and Spoil the Judge?*, 41 DEPAUL L. REV. 59 (1991); *see also* P. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969).

After cataloging the criticisms and defenses of the Act, Professor Michael Gerhardt observed:

> [T]o be meaningful, article III's guarantees must protect judges not only collectively from other branches, but also individually from harassment by other judges (even for misconduct that may arguably be the basis for an impeachment). Absent protection for the independence of individual federal judges from coercion from within as well as from without the judiciary, judicial independence becomes highly unlikely. By empowering federal judges to initiate complaints and investigations against other federal judges and by formalizing the complaint procedure, the Act increases the potential for some federal judges to intimidate and harass others. Indeed, many sitting judges have expressed their concern "that the provisions of the Act might be subject to abuse – that they might be misused to pressure or intimidate the nonconformist, the judge whose judicial style or legal philosophy are [sic] repugnant to the majority of his or her colleagues."

Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 73-74 (1989) (quoting *Hastings v. Judicial Conference*, 770 F.2d at 1107 (Edwards, J., concurring)).

By its mootness decision, the panel majority avoided the facial constitutional challenge to case suspension authority. However, it virtually conceded that the separation of powers contention might be meritorious if the case suspensions were considered, explaining that: (i) "We recognize that docket limitations can be a very serious matter," (App. 5a); (ii) "[T]he most we could say at McBryde's behest is that in imposing and affirming the suspension sanction the Judicial Council and Review Committee performed acts reserved by the Constitution to the House and a two-thirds majority of the Senate," (App. 7a); and, (iii) "[T]he claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification and is the only sanction in the case that remains unmoot" (App. 22a).

Furthermore, the majority's emphasis on the notion that Article III judicial independence is to protect the Judicial Branch from incursions by the Executive and Legislative Branches fails to give proper weight to the need for individual judicial independence, which this Court, other courts, and commentators have concluded has Article III stature. *See supra* at 15-20. Even if the majority were correct in emphasizing independence from the other branches, its discussion fails to recognize that the Act *is* an incursion by the Legislative Branch into the affairs of the Judicial Branch. The agencies that administer the Act were created by Congress, and it is Congress that has instructed them to impose on judges the punishments the Act authorizes.

The petition should be granted so that this Court can resolve these constitutional issues of exceptional importance.

IV. The Court Should Define the Statutory Limits on Judicial Council Authority under the Judicial Conduct and Disability Act.

The court of appeals held that 28 U.S.C. § 372(c)(10) barred Judge McBryde's claims that the sanctions clearly exceeded the agencies' statutory authority. Because the panel's statutory preclusion analysis is inconsistent with governing principles of this Court's cases, and because both the preclusion issue and the merits of Judge McBryde's statutory claims present issues important to the administration of the Act, review of these issues together with the constitutional issues is appropriate. Such review will clarify the scope of Council authority and judicial review under the Act—matters of great significance to the federal judiciary. Taking up these issues may also allow the Court to avoid some of the constitutional issues posed by the Council's excesses.

A. ***The Preclusion Issue.*** This Court has consistently held that when an administrative body acts in clear excess of statutory authority, there is a powerful presumption in favor of judicial review. This principle found early expression in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), where the Court held that courts "must have power in the proper proceeding to grant relief" against actions wholly lacking in statutory authority, for "[o]therwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual." *Id.* at 109-10.

The Court followed *McAnnulty* in *Leedom v. Kyne*, 358 U.S. 184 (1958), which held that the NLRA's limits on judicial review of NLRB orders did not preclude a court from hearing a claim that the Board had acted in excess of its delegated powers. The Court stated that "[t]his Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190. The Court has applied this

principle even in the face of an otherwise uncompromising statutory bar to review. In *Oestereich v. Selective Service System*, 393 U.S. 233 (1968), the relevant statute "unambiguous[ly]" provided that "no judicial review shall be made" of the agency's action. *Id.* at 235. This Court nevertheless held that the courts had the power to review a clear departure by the agency from its statutory mandate. *Id.*

The panel majority's refusal to hear Judge McBryde's claim that the Council and Review Committee acted beyond their statutory jurisdiction conflicts in principle not only with this Court's precedents, but also with the Sixth Circuit's decision in *Wayne State University v. Cleland*, 590 F.2d 627, 631-32 (6th Cir. 1978) (holding that a finality clause at least as broad as § 372(c)(10) did not preclude challenge to an agency's statutory authority). Moreover, it conflicts with decisions of the D.C. Circuit itself. That court has consistently held that it will decline review of "'basically lawless' agency action only when clearly instructed to do so," and that "such a drastic restraint on judicial inquiry" requires Congress to "ma[k]e its intentions plain." *Ralpho*, 569 F.2d at 623, 625. Similarly, in *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988), the court said that "[j]udicial review is favored when an agency is charged with acting beyond its authority" and will be withheld "only upon a clear and convincing showing of a contrary legislative intent." *Id.* at 221, 225. Other D.C. Circuit rulings with which the panel decision conflicts on this point are *U.S. Department of Treasury v. FLRA*, 43 F.3d 682, 688-90 (1994), *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 664 (1994), and *Gonzalez v. Freeman*, 334 F.2d 570, 575 (1964).

B. ***The Merits.***

1. ***The Act Does Not Authorize Punishment for Judicial Decisions and Rulings.*** The overwhelming majority of the Committee's evidence was testimony critical of Judge McBryde's judicial actions. The cross-examination of Judge McBryde was devoted almost entirely to questions about the

propriety of his rulings, whether he would rule the same way if he had it to do over again, and whether he considered the effect his decisions would have on lawyers and others. He was punished because the Council thought his judicial decisions, rulings, and rules were unreasonable or oppressive.

The Act does not authorize such proceedings. It provides for dismissal of complaints that are "directly related to the merits of a decision or procedural ruling." § 372(c)(3)(a)(ii). Legislative history confirms that the Act "*does not encompass complaints relating to the merits* of any decision or procedural ruling of a judge." S. REP. NO. 96-362, at 6. Even the district court recognized that "[o]n its face . . . the Act clearly precludes review of a judge's judicial decisions." (App. 82a). Other judges addressing the issue have reached the same conclusion. *E.g.*, *Matter of a Charge of Judicial Misconduct*, 141 F.3d 333, 336 (D.C. Cir. Jud. Council 1998); *In re McBryde* (App. 355a); *Duckworth v. Department of the Navy*, 974 F.2d 1140, 1141 (9th Cir. 1992).

The Review Committee, while acknowledging its lack of power to sanction Judge McBryde based on the merits of his decisions and procedural rulings (App. 143a), insisted that he was sanctioned for a "pattern" of decisions and rulings. *Id.* But the Council and Review Committee could not have evaluated the propriety of a "pattern" of decisions without evaluating the propriety of each. And sanctioning Judge McBryde for a "pattern" of judicial actions necessarily punishes him for the rulings included in the "pattern." The propriety of such sanctions is an important, unresolved issue under the Act that this Court should definitively decide.

2. *The Act Does Not Authorize Punishment for Conduct Not the Subject of a Complaint.* The Act sets forth a complaint-driven procedural scheme. It provides expressly for the filing of complaints (§ 372(c)(1)), for their handling by the circuit clerk and chief circuit judge (§§ 372(c)(2) & (3)), for dismissal of frivolous or merits-related complaints (§ 372(c)(3)), for notice to the subject judge and referral to an

investigating committee (§ 372(c)(4)), for investigation of and hearings on complaints (§§ 372(c)(5) & (11)), and for the disposition of complaints (§§ 372(c)(5), (6) & (10)). Essential to the process is a *written complaint* of misconduct or disability. The Act provides no authority for proceedings not based on a complaint.[5]

Whether filed by a complainant or identified by a chief judge, the complaint serves crucial functions. It is the vehicle for resolving the threshold question whether there is a cognizable misconduct issue. *See* § 372(c)(3). It is the means for giving the subject judge notice. *See* §§ 372(c)(2) & (4). And it defines the scope of special committee and judicial council proceedings. The Act specifically provides that a special committee is "to investigate the facts and allegations *contained in the complaint.*" § 372(c)(4)(A) (emphasis added). The investigation may be "as extensive as [the committee] considers necessary," § 372(c)(5), but it is at all times an investigation of the *allegations of the complaint*. Similarly, the disciplinary authority of the council is expressly tied to "the complaint." § 372(c)(6).

In this case, the Review Committee acknowledged that the majority of the actions for which the Council sanctioned Judge McBryde were not the subject of any complaint, either filed or "identified" by the chief circuit judge. Conversely, the Council essentially ignored all the "complaints." Nothing in the Act provides the Council a roving commission to punish a judge for rulings issued and procedures a judge throughout his career simply because an unrelated complaint has been filed or identified against him.

Now that the Council and Review Committee have set a precedent for punishing an Article III judge based on judicial

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[5] The Act permits a chief circuit judge to initiate proceedings absent a properly filed complaint only if he or she "identifies" a complaint and give written reasons for so doing. § 372(c)(1). Under this procedure, too, the written complaint remains the basis for all subsequent proceedings.

actions of the judge throughout his judicial career, which were not the subject of any § 372(c)(1) complaint, there is urgency in a decision of this Court that, in doing so, the agencies acted beyond the scope of their statutory authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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